ment Relations Act, 29 U.S.C. Sec. 185, to require specific performance by an employer of the provisions of the award of an arbitrator to whom a labor dispute had been referred in accordance with the terms of the contract between the employer and a labor union which represented the employees. The award directed the reinstatement of certain discharged employees and reimbursement for loss of wages. The suit was resisted by the employer on the grounds (1) that the court lacked jurisdiction over the subject matter and (2), if the court had jurisdiction, the award was invalid because (a) the arbitrator exceeded his power and (b) the award was uncertain and incomplete. The District Judge overruled these objections and ordered that the employer comply with the decision and award of the arbitrator and this appeal followed.

The suit was brought under Sec. 301 of the statute in the first instance to secure specific performance of an agreement to arbitrate employee grievances contained in a collective bargaining agreement between Enterprise Wheel and Car Corporation, the employer, and United Steelworkers of America, the representative of the employees. The contract covered the period from April 5, 1956 until April 4, 1957, at midnight. It provided certain procedures for the adjustment of grievances and, in case they failed to bring about a settlement, that the grievances should be submitted to a panel of three members, one appointed by the Union, one by the Corporation and a third as an impartial umpire selected by the parties, and that the decision of the umpire should be final and binding upon the parties.

On January 18, 1957, eleven employees were discharged when they walked off their jobs by reason of a dispute [fol. 44] over the discharge of another employee by the Corporation. The contract provided that the right to manage the plant and to direct the employees was vested exclusively in the Company, including the right to hire and discharge; but the contract also provided that in the exercise of these rights the management should not peremptorily discharge a member of the union but in all instances in which the management might conclude that an employee's

conduct would justify suspension or discharge, he should first be suspended for not more than five days during which he might request a hearing and a statement of his offense and after the hearing the management should conclude whether to convert the suspension into discharge or revoke the same, and that if a discharge was decided upon the employee might present a grievance within five days thereafter.

The Union claimed that the eleven discharged men had a grievance under the terms of the contract but the Corporation rejected this contention, insisting that the men had quit and it refused to reemploy them. The grievance procedures provided by the contract were then invoked but no settlement was reached and, accordingly, the Union called for arbitration but the Corporation refused to arbitrate. A charge of unfair labor practice was filed by the Union before the National Labor Relations Board, but the Board refused to issue a complaint. Finally, on August 22, 1957, four months after the contract had expired, the Union instituted the present suit. The Company answered, raising jurisdictional and other questions, and the Union filed a motion for summary judgment which, after full hearing, the court granted and ordered the Corporation to submit the grievance to arbitration in accordance with the terms of the collective bargaining agreement.

[fol. 45] In obedience to this order, the parties proceeded to arbitration. The arbitrator after hearing reached the conclusion that the penalty of discharge was not justified. He held that the action of the men in quitting their jobs should not be condoned but that the facts warranted only the imposition of a disciplinary penalty of suspension of ten days. He filed his award on April 10, 1958. Therein he directed (1) that the discharge of the men be set aside and reduced to a disciplinary penalty of ten days' suspension, to be calculated from January 18, 1957, and (2) that the Corporation reinstate each of the men who desired reinstatement with classification and seniority status as of the date of the discharge, and (3) that the Corporation reimburse the men for all time actually lost from work, which they would otherwise have had at the regular rate of pay less the ten-day suspension period and less such amounts as

each had received from other employment after the expiration of the ten-day period.

The first contention of the employer is that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees and is, therefore, not tenable under the decision in *Employers* v. *Westinghouse Corp.*, 348 U.S. 437. We rejected a similar contention in our opinion in *Textile Workers Union of America* v. *Cone Mills Corp.*, filed this day, and for the reasons therein stated now hold that the District Court had jurisdiction in the pending case.

The second contention of the employer is that the arbitrator exceeded the power vested in him by the collective bargaining contract because he directed that the discharged men be reimbursed for loss of pay which occurred after the expiration of the contract. The award directed the em- [fol. 46] ployer not only to reinstate the grievants but also to reimburse them for all time lost from work at the regular rate of pay less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period. The employer's position is that since the contract terminated on April 4, 1957, the grievants' rights thereunder expired on that day, and thereafter the Corporation had the right to discharge them at will and without cause so long as the discharge was not for a reason prohibited by the Labor Act. Hence at the time of the rendition of the award they had no right to reinstatement and no right to back pay beyond the expiration date of the contract. On this account the contention is made that the award is void and should be vacated.

This result does not follow from the premises although it may be in accord with the earlier rule that when an award goes beyond the terms of the submission agreement the entire proceeding will be vacated. The view now prevailing is that even if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, if it is of such character that the court can separate the part within from the part beyond the submission. See *Lyle* v. *Rodgers*, 18 U.S. 394, 409; *McCormick* v. *Gray*, 54 U.S. 26, 39; *York & Cumberland*

R.R. Co. v. *Meyers*, 59 F.S. 246, 252; *De Groot* v. *United States*, 72 U.S. 419, 430-31; *Marceron* v. *Chevy Chase Services, Inc.*, D.C. Cir., 258 F.2d 155, 158; *Moyer* v. *Van-Dye-Way Corp.*, 3 Cir., 126 F.2d 339, 341; 3 Am. Jur.; *Arbitration & Award*, Secs. 123, 134; 6 C.J.S., *Arbitration & Award*, Sec. 89; Sturges, *Commercial Arbitration Awards*, Sec. 226 (Vernon Law Book Co., 1930). It follows that the award in this case should not be stricken down completely if the valid and invalid parts can be separated by the court.

[fol. 47] We are told by the Union that the award is completely valid and that there is no need to restrict it to the contract period. It is assumed that if the men had not been wrongfully discharged, their employment would have continued indefinitely and hence their recoverable loss continues until the present date; and that to hold otherwise would make it possible for an employer to plan a mass number of discriminatory discharges to take effect shortly before the expiration date of the contract without incurring any liability and thereby accomplish the precise thing which the labor contract is designed to prevent. Our attention is called to decisions of the Labor Board in which it held that a recovery for loss of wages caused by discriminatory discharge should cover the period after as well as the period before the expiration date of the contract because the loss would not have occurred if the discharge had not taken place. See *Western Union Tel. Co.*, 83 NLRB 238; *Victor Metal Products Corp.*, 106 NLRB 1361.

We do not think that these decisions are controlling here. The power of the National Labor Relations Board to formulate policies and prescribe disciplinary procedures to effectuate the purposes of the statute* is not restricted by the terms of the contract between the employer and the union, as must be the case when either party to a labor agreement sues for specific performance or breach of contract under Sec. 301 of the statute. The general provisions of the Labor Act govern the employer-employee relationship under the guidance of the Labor Board while Sec. 301 of

* See 29 U.S.C. Sec. 160(c); *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376, 390-2.

the statute is designed to afford the parties to a labor contract an opportunity to enforce the rights which they derive from that agreement. So it has generally been held [fol. 48] that collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute. See *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 5 Cir., 119 F.2d 509, 515, cert. den. 314 U.S. 656; *Elder* v. *New York Cent. R. Co.*, 6 Cir., 152 F.2d 361, 364; *Beeler* v. *Chicago R. I. & P. Ry.*, 10 Cir., 169 F.2d 557, 559, cert. den. 335 U.S. 903; *Edelstein* v. *Duluth M. & I. Ry. Co.*, 225 Minn. 508, 520; *Walker* v. *Penn-Reading S.S. Lines*, 142 N.J. Eq. 588, 600-01.

The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows* v. *Radio Industries*, 7 Cir., 222 F.2d 347, 349; *Atchison T. & S.F. R. Co.*, v. *Andrews*, 10 Cir., 211 F.2d 264, 265; *Warden* v. *Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the employee is unrestricted. See *United Protective Workers* v. *Ford Motor Co.*, 7 Cir., 223 F.2d 49, 52; *Odell* v. *Humble Oil & Refining Co.*, 10 Cir., 201 F.2d 123, 128, cert. den. 345 U.S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended [fol. 49] so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award.

It is no answer to this position to suggest that it would afford an opportunity to the employer to indulge in discriminatory discharges on a large scale. Such a situation might well be handled as was done in *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206, 218-19, where it was held that the Labor Board may forbid a wholesale discharge of employees, whose tenure is determinable at will, if the discharge is undertaken to effect a purpose forbidden by the Labor Act. Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause. In the present case the agreement was for one year, expiring April 4, 1957, and, as we understand the record, there was no renewal thereof for the subsequent year.

Finally, the Corporation makes the point that the award of the arbitrator was incomplete and indefinite and therefore incapable of enforcement. As we have seen, the award directed the Corporation to reinstate the grievants and compensate them for the time lost less the ten-day suspension period and less such amounts as they may have received from other employment; but the arbitrator failed to include in the award the amounts which had actually been earned or, by the exercise of due diligence, could have been earned by the grievants in other employment. It has generally been held that a final award must be certain in its terms or provide means and data by which it may be made certain by mathematical calculation, and that if it is deficient in this [Vol. 50] respect it must be vacated since the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. See 3 Am. Jur., *Arbitration-Award*, Secs. 84, 125; 104 A.L.R. 710, 718, 725.

If this rule were given effect in the pending case the award would be set aside, for it is obviously so incomplete that disputes may well arise as to the amounts of back pay which the employer is obliged to make to the discharged workers. We think, however, that the rule forbidding the resubmission of a final award, which was developed when the courts looked with disfavor upon arbitration proceed-

ings, should not be applied today in the settlement of employer-employee disputes. As pointed out in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, Congress has clearly indicated that the arbitration of grievance disputes for the preservation of industrial peace is to be encouraged and the Supreme Court has directed the federal courts to fashion a federal substantive law in accordance with this policy. This may readily be done in the pending case by requiring the parties to take steps to complete the arbitration so that the amounts due the grievants for loss of time will be definitely ascertained. Accordingly, the judgment of the District Court is affirmed, insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but is modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

Judgment modified and case remanded for further proceedings.

[fol. 51]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION, Appellant,

vs.

UNITED STEELWORKERS OF AMERICA, Appellee.

Appeal From the United States District Court for the Southern District of West Virginia

JUDGMENT—Filed and Entered June 16, 1959

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Huntington, for further proceedings in accordance with the opinion of this Court; and that the costs on appeal be divided equally between the parties.

June 16, 1959.

Morris A. Soper, United States Circuit Judge.

[fol. 52] Petition for Rehearing covering 21 pages filed July 10, 1959, omitted from this print.

It was overruled and nothing more by order, August 24, 1959.

[fol. 76] July 27, 1959, memorandum of appellant in opposition to petition for rehearing filed by leave of court.

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

[Title omitted]

Appeal From the United States District Court for the Southern District of West Virginia, at Huntington.

ORDER MODIFYING OPINION—Filed and Entered August 24, 1959

It is ordered that the opinion of the Court, filed herein on June 16, 1959, be modified so as to substitute the following in place of the last sentence of said opinion:

Accordingly, the judgment of the District Court is affirmed insofar as it holds that the Court has jurisdiction to direct the specific performance of the award, but the judgment is modified so as to omit the requirement that the Enterprise Wheel and Car Corporation comply with the award of the Arbitrator insofar as the award requires the reinstatement of the discharged employees; and the judgment is further modified so as to limit the recovery of wages for loss of time to the period of the contract and to [fol. 77] require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

Morris A. Soper, United States Circuit Judge.

Clement F. Haynsworth, Jr., United States Circuit Judge.

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

[Title omitted]

Appeal From the United States District Court for the Southern District of West Virginia, at Huntington.

ORDER OVERRULING PETITION FOR REHEARING—
Filed and Entered August 24, 1959

The petition for rehearing in the above entitled case, having been read and considered, it is ordered that the same be and is hereby overruled.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

Morris A. Soper, United States Circuit Judge.

Clement F. Haynsworth, Jr., United States Circuit Judge.

[fol. 78] September 5, 1959, mandate issued and transmitted to the Clerk of the United States District Court at Huntington, West Virginia.

September 5, 1959, record returned to the Clerk of the United States District Court at Huntington, West Virginia.

[fol. 79] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 80]

SUPREME COURT OF THE UNITED STATES

No. 538, October Term, 1959

UNITED STEELWORKERS OF AMERICA, Petitioner,

vs.

ENTERPRISE WHEEL AND CAR CORPORATION.

ORDER ALLOWING CERTIORARI—January 11, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is set for argument immediately following No. 443.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

ENTERPRISE WHEEL AND CAR CORPORATION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ARTHUR J. GOLDBERG
DAVID E. FELLER
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

JAMES P. CLOWES
607 Riley Law Building
Wheeling, West Virginia

CARNEY M. LAYNE
1017 Sixth Avenue
Huntington, West Virginia

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	17
APPENDIX	18
Opinion of the United States Court of Appeals for the Fourth Circuit	18
Judgement of the United States Court of Appeals for the Fourth Circuit	26
Order of the United States Court of Appeals for the Fourth Circuit modifying its Opinion	27
Order of the United States Court of Appeals for the Fourth Circuit Denying Rehearing	28

TABLE OF CITATIONS

Cases

Burchell v. Marsh, 17 How. 344 (1855) 7, 8

Local No. 611, Int'l Chemical Workers, 123 N.L.R.B. No. 182, 44 L.R.R.M. 1164 (1959) 11, 12

NLRB v. Knight Morley Corp., 251 F. 2d 753 (6th Cir. 1957) 11, 12

NLRB v. Wooster Div., Borg-Warner Corp., 356 U. S. 342 (1958) 12

Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957) 6, 9, 11

Timken Roller Bearing Co. v. NLRB, 161 F. 2d 949 (6th Cir. 1947) 12

United Steelworkers v. American Mfg. Co., October Term, 1959, No. 360 (certiorari granted Nov. 9, 1959) 9

United Steelworkers v. Warrior & Gulf Nav. Co., October Term, 1959, No. 443 (petition for certiorari pending) 9

Vitarelli v. Seaton, 359 U. S. 535 (1959) 14, 15, 16

Statutes

Labor Management Relations Act, 1947 § 301(a), 61 Stat. 156, 29 U.S.C. § 185 ..... 2, 3, 7, 8

Other

Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

ENTERPRISE WHEEL AND CAR CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on June 16, 1959.

OPINIONS BELOW

The first opinion of the United States District Court for the Southern District of West Virginia (R. 2a-11)[1] was delivered orally and is not reported. The second opinion of the District Court (R. 1a-3) is reported at 168 F. Supp. 308.

[1] The record in this case consists in part of the separate appendices to the briefs of the parties in the Court of Appeals. Record references to the appendix of the appellant's brief will consist of the number "1a" (which is the page in the record certified by the Clerk of the Court of Appeals at which the appendix appears) followed by the page number in the appendix. Similarly, record references to the appellee's appendix will consist of the number "2a" followed by the page number in that appendix. Thus, "R. 2a-11" refers to page 11 of the appendix to the appellee's brief. Record references to the proceedings in the Court of Appeals will simply consist of the page number in the certified record.

The opinion of the Court of Appeals (R. 4) as modified (R. 16) is reported at 269 F. 2d 327. The original opinion and the order modifying it are reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1959. A petition for rehearing was denied on August 24, 1959. This court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Employees were discharged during the term of a collective bargaining agreement. The discharges were arbitrated after the agreement had expired. It was found by the arbitrator (a) that the discharges were in violation of the agreement and (b) that the agreement required reinstatement with back pay as the remedy for such a violation. In an action brought under § 301 of the Labor Management Relations Act, the Court of Appeals refused to enforce the reinstatement portion of the award. The questions presented are:

1. Under § 301, are arbitrators' determinations as to remedy to be treated as questions of interpretation and application of the agreement, or as questions of law to be decided by the court?

2. If the question of remedy is one of interpretation and application of the agreement, do the federal courts have the right, under § 301, to review *de novo* the arbitrators' decisions on such questions?

3. If such review is proper, should the provisions of the agreement requiring reinstatement of employees unjustly discharged be construed as being applicable only to cases decided prior to the expiration date of the agreement?

4. If the question of remedy is one of law, as the

Court of Appeals here held, was the court correct in concluding that an arbitrator may not, after the agreement has expired, prescribe restoration of the status quo as a remedy for a violation which occurred during the term of the agreement?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The petitioner, United Steelworkers of America (hereinafter called the union), is the collective bargaining representative for the production and maintenance employees at the Huntington, West Virginia plant of the respondent, Enterprise Wheel and Car Corporation (hereinafter called the company). From April 5, 1956, through April 4, 1957, there was in effect between the parties a collective bargaining agreement prescribing the wages, hours, and other terms and conditions of employment of those employees. The agreement provided, *inter alia*, that no employee could be discharged without first being given a hearing, and that if after such hearing an employee was discharged, he could appeal his discharge to the grievance procedure provided in the agreement. (R. 1a-17) The grievance procedure involved several steps, consisting of discussions between union and company representatives at ascending levels of authority, and included the right ultimately to submit any unresolved grievance to arbitration. (R. 1a-16)

The remedy for unjust discharges was expressly set forth in the agreement as follows:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." (R. 1a-18)

On January 17, 1957, a group of eleven employees covered by the agreement left their jobs in connection with a dispute over the discharge of another employee. Within thirty minutes, the employees were advised by a union staff representative to return. They then requested, and were given, permission from the president of the company to return to work. A few moments later, however, the president, after consulting his attorney, informed the local union president that the eleven men who had gone out "would not be permitted to return at the present time." (R. 2a-20) When the men attempted to return to work the following day, they found their time cards missing from the rack, and they were told that they "didn't have any job there anymore until this thing was settled one way or the other." (R. 2a-21)

On January 23 a grievance was filed, claiming that the men had been discharged improperly and without cause. (R. 2a-18) The grievance was not settled in the preliminary steps of the grievance procedure, and on February 17 the union requested that the matter be submitted to arbitration, in accordance with the agreement. The company first refused to arbitrate. Subsequently, the company changed its position and agreed to submit the matter to arbitration, and Milton H. Schmidt was chosen by the parties as the arbitrator. On April 6, 1957, however, the company again changed its position, and notified the union by letter that it would not arbitrate. (R. 2a-2)

The union then brought an action in the United States District Court for the Southern District of West Virginia, under Section 301 of the Labor Management Relations Act, to specifically enforce the arbitration provisions of the collective bargaining agreement. After the company had filed its answer (R. 2a-8), the union moved for summary judgment. The matter was heard on the pleadings and affidavits. The court rendered an oral opinion (R. 2a-11), and entered an order directing "specific performance of step Four of Article III of the Agreement." (R. 1a-15).

Accordingly, the grievance was submitted to arbitration before Milton H. Schmidt, who had been appointed by both parties in accordance with the procedures specified in the agreement. Mr. Schmidt rendered his decision on April 10, 1958. (R. 2a-17) He ruled that the men had been discharged in violation of the agreement and that their penalty for leaving their jobs without permission should have been only a suspension of 10 days. He further ruled that under the agreement they were entitled to reinstatement, regardless of the fact that the agreement itself had expired. He therefore awarded reinstatement with back pay, minus the pay for the 10-day penalty period. (R. 2a-23)

The company refused to comply with the award, and the union moved the district court for an order directing the company to show cause why it had not done so. (R. 2a-24) The company filed an "Answer and Resistance" to the motion, alleging that the court lacked jurisdiction to enforce the award, and that the award was "illegal, improper, invalid, and void" for several specified reasons, among them the fact that the applicable collective bargaining agreement had expired prior to the date of the award. (R. 2a-26)

On December 11, 1958, the court entered an order to show cause, and by consent of the parties and the court, the show cause hearing was immediately held on the basis of the papers already filed. (R. 2a-29) On December 16, the

court rendered an opinion and an order directing the company to comply with the arbitrator's award. (R. 1a-1, 3).

The opinion of the district court rejected the company's contention that section 301 does not confer on the federal courts jurisdiction to enforce arbitration awards which provide benefits to individual employees. The court noted that the proceeding before it was ancillary to the original action to compel arbitration, over which it plainly had jurisdiction by virtue of the decision of the Supreme Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). It reasoned that if there was jurisdiction to compel arbitration, there must also be jurisdiction to enforce the resultant award. The court also concluded that a show cause proceeding was a proper method to secure compliance with an award, in a case in which the arbitration had been held pursuant to a court order directing the company to comply with its obligations under the arbitration provisions of the collective bargaining agreement.

As to the award itself, the court held that it was valid and enforceable in every respect. It rejected the Company's argument that the award was not sufficiently specific as to the manner of calculating back pay to be enforceable. (R. 1a-9) In answer to the argument that the employees could not be reinstated because the agreement had expired, the court pointed out that

> "To allow the defendant to only reimburse the employees up until April 4, 1957, would be to allow the defendant to profit unfairly from its own wrong doing. If the men had not been unjustly discharged, it must be assumed that their employment would have continued to date; until reinstated, these employees continue to suffer loss of wages by virtue of the defendant's improper action irrespective of any expiration of the contract." (R. 1a-10, 11)

The company appealed this decision to the United States Court of Appeals for the Fourth Circuit. That court agreed

with the district court that section 301 conferred jurisdiction on the federal courts to enforce an arbitration award rendered under a collective bargaining agreement. It held that the failure of the award to specify the manner of calculating back pay did not render it void, and that that problem should be solved by resubmitting the question to arbitration. However, the court concluded that the award in this case could not be enforced in full. The court reasoned that because collective bargaining agreements "do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its term," it followed that employees who were discharged unlawfully during the term of an agreement could not enforce an award ordering reinstatement if the award is rendered after the agreement has expired. On that reasoning, the court modified the judgment "so as to omit the requirement that the Enterprise Wheel & Car Corporation comply with the award of the Arbitrator insofar as the award requires the reinstatement of the discharged employees . . . [and] to limit the recovery of wages for loss of time to the period of the contract . . ." (R. 16)

The union filed a petition for rehearing, asserting that the decision of the court was contrary to decisions of the United States Supreme Court and the National Labor Relations Board which had been rendered subsequent to the argument of the present case in the Court of Appeals, and that the decision was contrary to the precedents and policies on which the court had relied. (R. 15) On August 22, 1959, the petition for rehearing was denied. (R. 17).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which should be determined by this Court. That is the question of the extent to which a federal court, when it is asked to enforce an arbitration award under section 301 of the Labor Management Relations Act, may or

should review the merits of that award before enforcing it.

The arbitrator in this case decided that the collective bargaining agreement required the employer to reinstate employees who had been unjustly discharged during its term, even though the agreement had meanwhile expired. He based this decision on a clause of the agreement which specifically required reinstatement of employees who were discharged in violation of the agreement, and which was not by its terms limited to cases decided prior to the expiration of the agreement. The company's position apparently was that when the agreement expired, that clause could no longer be applied, even to cases which had arisen prior to the expiration date. The union's position was that the clause was applicable to all cases which arose during the term of the agreement, including those decided after its expiration, just as the arbitration clause itself was applicable, even after the agreement itself had expired, to grievances arising during its term.

The principal question here is not whether the union or the company was correct, but whether a federal court in a section 301 proceeding should review *de novo* a decision which was made by an arbitrator in the performance of his duty to interpret and apply a collective bargaining agreement.

This issue was resolved with respect to commercial arbitration over a century ago, when this Court reaffirmed the common law rule as follows:

> "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or in fact. A contrary course would be a substitution of the judgment of the

Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell* v. *Marsh*, 17 How. 344, 349 (1855)

As the court below recognized, many of the rules governing commercial arbitration are not suitable to grievance arbitration problems. (App. 25) The rule that arbitration awards are subject only to the most limited review, however, is one which would seem to fit the needs of grievance arbitration perfectly, since it allows the arbitrator maximum flexibility, which labor relations experts agree he must have in order to perform his function. See, e.g., Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

The issue here is closely related to the issues now before the Court in *United Steelworkers* v. *American Mfg. Co.*, No. 360 (certiorari granted Nov. 9, 1959) and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, No. 443 (petition for certiorari pending). Those cases each involve an action to compel arbitration, and the question presented in each is whether the court should examine the merits of a grievance before requiring the parties to arbitrate it. Here the action is to enforce an award, and the question is the extent to which the court should review the arbitrator's decision before enforcing it. Both questions are equally important to the development of a sound body of federal law relating to grievance arbitration, as contemplated in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), since they both raise the very fundamental question of the extent to which a court should concern itself with issues which the parties have agreed should be resolved through arbitration.

2. The Fourth Circuit treated the issue in this case not as an issue of contract interpretation for the arbitrator, but as an issue of law for the court. Without referring to the

language of the particular agreement at all, the court held flatly and broadly that an arbitrator may not prescribe as a remedy for violation of a collective bargaining agreement the restoration of the status quo, if the agreement has expired in the interim between the violation and the final arbitration award. Assuming that the court was correct in treating the question as one of law, the court's decision will have such a severe impact on grievance and arbitration procedures under collective bargaining agreements that it should be reviewed by this court.

It is not at all unusual for several months to elapse between the filing of a grievance and the determination of that grievance by an arbitrator. And, as this case demonstrates, it is not difficult for an employer to delay the process further by forcing the union to resort to litigation to enforce the arbitration clause. Thus in many cases an award may be rendered after the applicable collective bargaining agreement has expired.

Most arbitration awards which are favorable to the union provide as a remedy the restoration of the status quo. This is true not only of awards involving discharges, but also those involving subcontracting, lay-offs, transfers, promotions, demotions, etc. In all of these cases, and in many others, restoration of the status quo is plainly the only effective remedy. Therefore, if the holding of the Fourth Circuit is correct, there will necessarily be many instances of violations of collective bargaining agreements which cannot be effectively remedied through arbitration.

Moreover, the decision in the present case threatens to impair the effectiveness of the preliminary steps of the usual grievance procedures as well. Since arbitration is an expensive and time-consuming process, particularly if a large backlog of unresolved grievances is permitted to accumulate, it is important that a large proportion of grievances be settled in the steps preceding arbitration. Prior to the present decision, the mere existence of an arbitration clause

tended to promote prompt and fair settlement of grievances, since each party was aware that if its position lacked merit it would not ultimately be sustained by the arbitrator. Under the Fourth Circuit's ruling in this case, however, it would be advantageous for an employer to delay the settlement of grievances as long as possible, in the hope that by the time they reached arbitration the existing agreement will have expired and awards favorable to the union would not be enforceable.

The present decision, therefore, could seriously impede the smooth operation of grievance and arbitration procedures under collective bargaining agreements. That fact in itself makes the issue here one of great importance, since, as this Court has recognized, federal labor policy puts a great value on such procedures as a peaceful method of settling industrial grievances. See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

3. The decision of the Fourth Circuit conflicts directly with the approach taken by the National Labor Relations Board in *Local No. 611, Int'l Chemical Workers*, 123 N.L.R.B. No. 182, 44 L.R.R.M. 1164 (June 5, 1959), and the Sixth Circuit in *NLRB* v. *Knight Morley Corp.*, 251 F. 2d 753 (1957), upon which the Board's decision relied.

The *Chemical Workers* case arose out of a set of facts very similar to those in the present case. The employer had discharged a group of employees shortly before the termination of a collective bargaining agreement, and the union sought their reinstatement. The grievance had not reached arbitration when the termination date of the agreement approached and negotiations for a new agreement were commenced. The union, instead of continuing to push the grievance to arbitration, made reinstatement of the employees one of the bargaining demands in the negotiations for a new agreement. The employer took the position that the dispute should not be made a part of the negotiations,

but should be settled under the grievance and arbitration provisions of the expired agreement. The union adhered to its position, however, and refused to agree to any over-all settlement which did not provide for reinstatement of the employees. The Board held that the union, by insisting at the bargaining table upon reinstatement of the employees, had committed an unfair labor practice.

This result followed, the Board held, from two well-established principles. The first is that an employer does not violate his duty to bargain collectively if he refuses to discuss a matter at the bargaining table on the ground that it can appropriately be disposed of under the grievance and arbitration procedure of the collective bargaining agreement. See *Timken Roller Bearing Co.* v. *NLRB,* 161 F. 2d 949 (6th Cir. 1947). The second is that it is an unfair labor practice for either party to insist to the point of deadlock on something which the other party is not obligated under the Act to bargain about. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958).

The Sixth Circuit had previously held, *Knight Morley Corp.*, that the *Timken* principle was applicable to an employer's refusal to discuss at the bargaining table the Union's demand for reinstatement of certain employees who had been discharged during the term of the agreement, even though the agreement had since expired. The Board in *Chemical Workers* adopted the reasoning of the court in *Knight Morley,* and therefore concluded that it was an unfair labor practice for the union in similar circumstances to insist on reinstatement as a pre-requisite to reaching an agreement. And, in doing so, it expressly relied on the *Lincoln Mills* case and the policy in favor of settling disputes through arbitration.

It is plain that the decision of the Fourth Circuit in the present case is at war with the decision of the Sixth Circuit in *Knight Morley* and the decision of the NLRB in the *Chemical Workers* case. In substantially identical situa-

tions, the Board and the Sixth Circuit say that the remedy is arbitration, not collective bargaining, and the Fourth Circuit says the remedy is collective bargaining, not arbitration. Taken together, the two approaches create this incongruous situation: when an employee is discharged in violation of a collective bargaining agreement and the agreement expires before the case has been arbitrated, the union is powerless to redress the wrong. If the union attempts to gain reinstatement of the employee through arbitration, it would not, under the present decision, be able to enforce a favorable award. If the union asks the employer to discuss the discharges outside the grievance procedure, the employer is free to refuse. If the union made reinstatement of the employees a condition of signing a collective bargaining agreement, it would be guilty of an unfair labor practice. The same dilemma would arise whenever there is an unresolved grievance in existence at the expiration of an agreement, whether it involves a discharge or some other management action which is in violation of a collective bargaining agreement and which could be effectively remedied only by a restoration of the status quo.

The facts of the present case illustrate what can happen to labor relations when no method is available for settling an unresolved grievance. There has been no agreement between the company and the union in this case since April, 1957. The sole obstacle to an agreement has been the dispute over the reinstatement of the eleven employees. (R. 2a-32) The union has felt that it could not forsake the interests of the eleven men who had been wrongly discharged and the company has stubbornly refused to reinstate them. Under the law as it presently stands, there is no way that this problem can be resolved, either through arbitration or through collective bargaining. As a result, the company and the public are not protected by a no-strike agreement, and the employees are not protected by a written agreement as to the terms and conditions of their employment.

4. The reasoning of the Court of Appeals in the present case is inconsistent with the decision of this Court in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). The Fourth Circuit based its conclusion that the arbitrator had no power to order reinstatement or back pay beyond the expiration date of the agreement on the premise that once the agreement had expired, the employer would have had the right to discharge any employee with impunity. The union did not quarrel with the premise, but took the position that the holding did not follow from it. The union argued that the question of what the employer might at another time have had the right to do is not relevant to the question of the power of the arbitrator to determine the appropriate remedy for discharges which, when they occurred, were admittedly in violation of the agreement. The union contended that the question of the appropriate remedy, being a question of interpretation and application of the agreement, was exclusively a question for the arbitrator, and that even if it were reviewable by a court, the appropriateness of the remedy would not be determined by what the company would later have had the right to do, but what in all probability it would have done. In other words, the union argued that reinstatement with back pay was the proper remedy, even though the employer would later have had the right to discharge the employees involved, so long as there was no evidence or no allegation that in fact it would have discharged them. This position is supported by the Supreme Court's decision in *Vitarelli*, which was rendered after the present case had been briefed and argued in the Court of Appeals.

Vitarelli involved an employee of the Department of the Interior who had been discharged for security reasons on September 2, 1954. This Court held that the discharge was invalid, since Vitarelli had not been accorded the procedural rights to which he was entitled under an Order of the Department which prescribed procedures for security discharges. That aspect of the case is not relevant here.

The case involved a further complication, however. The Court conceded that the Department would have had the right to discharge Vitarelli summarily, so long as the discharge was not stated to be for security reasons. On October 10, 1956, the Department had sent Vitarelli a new notice of discharge, which purported to be a substitute for the original notice and which did not state that it was based on security grounds. The Government argued, therefore, that even if the original notification of discharge was invalid, the second notification was valid, at least as of the date of its issuance, and thus precluded any reinstatement. The Court rejected that argument:

> "Granting that the Secretary could at any time after September 10, 1954, have validly dismissed petitioner without any statement of reasons . . ., we cannot view the delivery of the new notification to petitioner as an exercise of that summary dismissal power." 359 U. S. at 545.

In other words, this Court held that *while the Government had the power summarily to dismiss Vitarelli, it had not exercised that power, and therefore the remedy for the unlawful discharge was reinstatement with full back pay.*

The dissenting opinion took issue with the majority only as to the question whether the 1956 notification should be deemed a valid exercise of the Department's power to discharge summarily. The dissenters did not disagree with the majority's position that reinstatement would be the appropriate remedy if the power to discharge—although it was present—had not in fact been exercised.

There are of course factual differences between the *Vitarelli* case and the present case. The present case involves private employees whose rights are derived from a collective bargaining agreement; *Vitarelli* involved a Government employee whose rights derived from a Departmental Order. But there is no difference in principle, so

far as the issue with which we are now dealing is concerned. For purposes of this case, the important aspect of *Vitarelli* is that this Court there held that when an employee is unlawfully discharged, the appropriate remedy is reinstatement with full back pay, even though his employer could subsequently have discharged him legally, so long as the employer in fact did not discharge him legally. That principle, which the Court accepted unanimously, is equally applicable in the present case.

Indeed, the argument of the Union in this case follows *a fortiori* from *Vitarelli*. This Court in *Vitarelli* decided that an employee who was unlawfully discharged was entitled to reinstatement *as a matter of law*, although the employer could have subsequently discharged him legally. In this case the parties have themselves provided in their agreement that if an employee is found to have been discharged in violation of the agreement, the arbitrator shall order reinstatement and back pay. The question here is simply whether the arbitrator has the power to construe that provision of the agreement as permitting the same remedy which this Court in *Vitarelli* applied without benefit of any express statutory or other authority. Surely if a court *must*, without benefit of any statute, grant reinstatement in such a case, an arbitrator, who has the power, by agreement, to interpret and apply the contract, *has the authority* to find that reinstatement, even after the contract term, is the indicated remedy for a violation of the contract during its term.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

ARTHUR J. GOLDBERG
DAVID E. FELLER
JERRY D. ANKER
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
JAMES P. CLOWES
607 Riley Law Building
Wheeling, West Virginia
CARNEY M. LAYNE
1017 Sixth Avenue
Huntington, West Virginia
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL and CAR CORPORATION,
Appellant,
versus
UNITED STEELWORKERS OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT HUNTINGTON. HARRY E. WATKINS, DISTRICT JUDGE.

(Argued April 16, 1959. Decided June 16, 1959.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

William C. Beatty (E. Jackson Boggs, and Fitzpatrick, Huddleston, Bolen & Hudgins on brief) for Appellant, and James P. Clowes and David E. Feller (Carney M. Layne, Arthur J. Goldberg and Jerry D. Anker on brief) for Appellee.

SOPER, Circuit Judge:

The question in this case is whether the District Court had power under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, to require specific performance by an employer of the provisions of the award of an arbitrator to whom a labor dispute had been referred in accordance with the terms of the contract between the employer and a labor union which represented the employees. The award directed the reinstatement of certain discharged employees and re-

imbursement for loss of wages. The suit was resisted by the employer on the grounds (1) that the court lacked jurisdiction over the subject matter and (2), if the court had jurisdiction, the award was invalid because (a) the arbitrator exceeded his power and (b) the award was uncertain and incomplete. The District Judge overruled these objections and ordered that the employer comply with the decision and award of the arbitrator and this appeal followed.

The suit was brought under Sec. 301 of the statute in the first instance to secure specific performance of an agreement to arbitrate employee grievances contained in a collective bargaining agreement between Enterprise Wheel and Car Corporation, the employer, and United Steelworkers of America, the representative of the employees. The contract covered the period from April 5, 1956 until April 4, 1957, at midnight. It provided certain procedures for the adjustment of grievances and, in case they failed to bring about a settlement, that the grievances should be submitted to a panel of three members, one appointed by the Union, one by the Corporation and a third as an impartial umpire selected by the parties, and that the decision of the umpire should be final and binding upon the parties.

On January 18, 1957, eleven employees were discharged when they walked off their jobs by reason of a dispute over the discharge of another employee by the Corporation. The contract provided that the right to manage the plant and to direct the employees was vested exclusively in the Company, including the right to hire and discharge; but the contract also provided that in the exercise of these rights the management should not peremptorily discharge a member of the union but in all instances in which the management might conclude that an employee's conduct would justify suspension or discharge, he should first be suspended for not more than five days during which he might request a hearing and a statement of his offense and after the hearing the management should conclude whether to convert the suspension into discharge or revoke the same, and that if a discharge was

decided upon the employee might present a grievance within five days thereafter.

The Union claimed that the eleven discharged men had a grievance under the terms of the contract but the Corporation rejected this contention, insisting that the men had quit and it refused to reemploy them. The grievance procedures provided by the contract were then invoked but no settlement was reached and, accordingly, the Union called for arbitration but the Corporation refused to arbitrate. A charge of unfair labor practice was filed by the Union before the National Labor Relations Board, but the Board refused to issue a complaint. Finally, on August 22, 1957, four months after the contract had expired, the Union instituted the present suit. The Company answered, raising jurisdictional and other questions, and the Union filed a motion for summary judgment which, after full hearing, the court granted and ordered the Corporation to submit the grievance to arbitration in accordance with the terms of the collective bargaining agreement.

In obedience to this order, the parties proceeded to arbitration. The arbitrator after hearing reached the conclusion that the penalty of discharge was not justified. He held that the action of the men in quitting their jobs should not be condoned but that the facts warranted only the imposition of a disciplinary penalty of suspension of ten days. He filed his award on April 10, 1958. Therein he directed (1) that the discharge of the men be set aside and reduced to a disciplinary penalty of ten days' suspension, to be calculated from January 18, 1957, and (2) that the Corporation reinstate each of the men who desired reinstatement with classification and seniority status as of the date of the discharge, and (3) that the Corporation reimburse the men for all time actually lost from work, which they would otherwise have had at the regular rate of pay less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period.

The first contention of the employer is that the District Court lacked jurisdiction over the subject matter of the suit because it was brought by the Union to enforce the personal rights of individual employees and is, therefore, not tenable under the decision in *Employees* v. *Westinghouse Corp.*, 348 U. S. 437. We rejected a similar contention in our opinion in *Textile Workers Union of America* v. *Cone Mills Corp.*, filed this day, and for the reasons therein stated now hold that the District Court had jurisdiction in the pending case.

The second contention of the employer is that the arbitrator exceeded the power vested in him by the collective bargaining contract because he directed that the discharged men be reimbursed for loss of pay which occurred after the expiration of the contract. The award directed the employer not only to reinstate the grievants but also to reimburse them for all time lost from work at the regular rate of pay less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period. The employer's position is that since the contract terminated on April 4, 1957, the grievants' rights thereunder expired on that day and thereafter the Corporation had the right to discharge them at will and without cause so long as the discharge was not for a reason prohibited by the Labor Act. Hence at the time of the rendition of the award they had no right to reinstatement and no right to back pay beyond the expiration date of the contract. On this account the contention is made that the award is void and should be vacated.

This result does not follow from the premises although it may be in accord with the earlier rule that when an award goes beyond the terms of the submission agreement the entire proceeding will be vacated. The view now prevailing is that even if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, if it is of such character that the court can separate the part within from the part beyond the submission.

See *Lyle* v. *Rodgers*, 18 U. S. 394, 409; *McCormick* v. *Gray*, 54 U. S. 26, 39; *York & Cumberland R. R. Co.* v. *Meyers*, 59 U. S. 246, 252; *De Groot* v. *United States*, 72 U. S. 419, 430-31; *Marceron* v. *Chevy Chase Services, Inc.*, D. C. Cir., 258 F. 2d 155, 158; *Moyer* v. *Van-Dye-Way Corp.*, 3 Cir., 126 F. 2d 339, 341; 3 Am. Jur., *Arbitration & Award*, Secs. 123, 134; 6 C.J.S., *Arbitration & Award*, Sec. 89; Sturges, *Commercial Arbitration Awards*, Sec. 226 (Vernon Law Book Co., 1930). It follows that the award in this case should not be stricken down completely if the valid and invalid parts can be separated by the court.

We are told by the Union that the award is completely valid and that there is no need to restrict it to the contract period. It is assumed that if the men had not been wrongfully discharged, their employment would have continued indefinitely and hence their recoverable loss continues until the present date; and that to hold otherwise would make it possible for an employer to plan a mass number of discriminatory discharges to take effect shortly before the expiration date of the contract without incurring any liability and thereby accomplish the precise thing which the labor contract is designed to prevent. Our attention is called to decisions of the Labor Board in which it held that a recovery for loss of wages caused by discriminatory discharge should cover the period after as well as the period before the expiration date of the contract because the loss would not have occurred if the discharge had not taken place. See *Western Union Tel. Co.*, 83 NLRB 238; *Victor Metal Products Corp.*, 106 NLRB 1361.

We do not think that these decisions are controlling here. The power of the National Labor Relations Board to formulate policies and prescribe disciplinary procedures to effectuate the purposes of the statute * is not restricted by

* See 29 U.S.C. Sec. 160(c); *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376, 390-2.

the terms of the contract between the employer and the union, as must be the case when either party to a labor agreement sues for specific performance or breach of contract under Sec. 301 of the statute. The general provisions of the Labor Act govern the employer-employee relationship under the guidance of the Labor Board while Sec. 301 of the statute is designed to afford the parties to a labor contract an opportunity to enforce the rights which they derive from that agreement. So it has generally been held that collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute. See *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 5 Cir., 119 F. 2d 509, 515, cert. den. 314 U. S. 656; *Elder* v. *New York Cent. R. Co.*, 6 Cir., 152 F. 2d 361, 364; *Beeler* v. *Chicago R. I. & P. Ry.*, 10 Cir., 169 F. 2d 557, 559, cert. den. 335 U. S. 903; *Edelstein* v. *Duluth M. & I. Ry. Co.*, 225 Minn. 508, 520; *Walker* v. *Penn-Reading S.S. Lines*, 142 N. J. Eq. 588, 600-01.

The rights which the employees derived from the 1956-57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time. *Meadows* v. *Radio Industries*, 7 Cir., 222 F. 2d 347, 349; *Atchison T. & S. F. R. Co.* v. *Andrew*, 10 Cir., 211 F. 2d 264, 265; *Warden* v. *Hinds*, 4 Cir., 163 F. 201; 35 Am. Jur., *Master & Servant*, Sec. 19 (pp. 457-58); American Law Institute Restatement, *Agency*, Sec. 442. The same principle is applied where a contract of employment contains a provision allowing termination after a period of notice has been given. In such cases damages for wrongful discharge are limited to the notice period since at the expiration of the period the right of the employer to discharge the

employee is unrestricted. See *United Protective Workers* v. *Ford Motor Co.*, 7 Cir., 223 F. 2d 49, 52; *Odell* v. *Humble Oil & Refining Co.*, 10 Cir., 201 F. 2d 123, 128, cert. den. 345 U. S. 941. It follows that in the pending case the discharged men had no right to damages for loss of time under the contract after its expiration and that the award should be amended so as to eliminate damages based on the subsequent period. This can easily be done without invalidating the entire award.

It is no answer to this position to suggest that it would afford an opportunity to the employer to indulge in discriminatory discharges on a large scale. Such a situation might well be handled as was done in *Labor Board* v. *Watermann S.S. Co.*, 309 U. S. 206, 218-19, where it was held that the Labor Board may forbid a wholesale discharge of employees, whose tenure is determinable at will, if the discharge is undertaken to effect a purpose forbidden by the Labor Act. Furthermore, the whole matter is subject to regulation by agreement between the parties which may provide for the continuation of the same contract terms in subsequent labor agreements curtailing the common-law right of the employer to discharge employees without cause. In the present case the agreement was for one year, expiring April 4, 1957, and, as we understand the record, there was no renewal thereof for the subsequent year.

Finally, the Corporation makes the point that the award of the arbitrator was incomplete and indefinite and therefore incapable of enforcement. As we have seen, the award directed the Corporation to reinstate the grievants and compensate them for the time lost less the ten-day suspension period and less such amounts as they may have received from other employment; but the arbitrator failed to include in the award the amounts which had actually been earned or, by the exercise of due diligence, could have been earned by the grievants in other employment. It has generally been held that a final award must be certain in its terms or pro-

vide means and data by which it may be made certain by mathematical calculation, and that if it is deficient in this respect it must be vacated since the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment. See 3 Am. Jur., *Arbitration-Award,* Secs. 84, 125; 104 A.L.R. 710, 718, 725.

If this rule were given effect in the pending case the award would be set aside, for it is obviously so incomplete that disputes may well arise as to the amounts of back pay which the employer is obliged to make to the discharged workers. We think, however, that the rule forbidding the resubmission of a final award, which was developed when the courts looked with disfavor upon arbitration proceedings, should not be applied today in the settlement of employer-employee disputes. As pointed out in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, Congress has clearly indicated that the arbitration of grievance disputes for the preservation of industrial peace is to be encouraged and the Supreme Court has directed the federal courts to fashion a federal substantive law in accordance with this policy. This may readily be done in the pending case by requiring the parties to take steps to complete the arbitration so that the amounts due the grievants for loss of time will be definitely ascertained. Accordingly, the judgment of the District Court is affirmed, insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but is modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

Judgment modified and case remanded for further proceedings.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Caption Omitted]

JUDGMENT

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed insofar as it holds that the court has jurisdiction to direct the specific performance of the award, but modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Huntington, for further proceedings in accordance with the opinion of this Court; and that the costs on appeal be divided equally between the parties.

MORRIS A. SOPER
United States Circuit Judge.

June 16, 1959.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Caption Omitted]

ORDER

It is ordered that the opinion of the Court, filed herein on June 16, 1959, be modified so as to substitute the following in place of the last sentence of said opinion:

Accordingly, the judgment of the District Court is affirmed insofar as it holds that the Court has jurisdiction to direct the specific performance of the award, but the judgment is modified so as to omit the requirement that the Enterprise Wheel and Car Corporation comply with the award of the Arbitrator insofar as the award requires the reinstatement of the discharged employees; and the judgment is further modified so as to limit the recovery of wages for loss of time to the period of the contract and to require the parties to take appropriate steps to complete the arbitration so that the award will contain a complete adjudication of the matters in dispute, as indicated in this opinion.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit
MORRIS A. SOPER
United States Circuit Judge
CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge

Filed:
Aug. 24, 1959

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption Omitted]

ORDER

The petition for rehearing in the above entitled case, having been read and considered, it is ordered that the same be and is hereby overruled.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit
MORRIS A. SOPER
United States Circuit Judge
CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge

Filed:
Aug. 24, 1959